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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERNESTO ALVARADO, Defendant and Appellant.	E060634 (Super.Ct.No. RIF1304600) OPINION

APPEAL from the Superior Court of Riverside County. Rafael A. Arreola, Judge. (Retired judge of the San Diego Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

On May 17, 2013, an information charged defendant and appellant Ernesto Alvarado with assault with a semi-automatic firearm under Penal Code[1] section 245 (counts 1 and 2); being a felon in possession of a firearm under section 29800, subdivision (a) (counts 3 and 4); and being a felon in possession of ammunition under section 30305, subdivision (a) (count 5). As to counts 1 and 2, the information also alleged that defendant personally used a firearm under section 12022.5, subdivision (a).

On January 6, 2014, a jury found defendant guilty of simple assault as a lesser included offense of count 2. The jury found the remaining charges and allegations true.

On January 7, 2014, upon defendant's request for immediate sentencing, the trial court sentenced defendant to prison for a total term of eight years, four months.

On appeal, defendant contends that (1) the trial court erred in denying his motion to suppress evidence; and (2) a $500 sex offender fine entry should be vacated. For the reasons set forth below, we agree with the parties that the sex offender fine entry should be vacated. We, however, hold that the trial court properly denied defendant's motion to suppress evidence.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL HISTORY

In April of 2013, Bernie Partida lived with his parents and his brother at a residence located in Perris, California. Defendant was Partida's friend and neighbor. On April 19, 2013, shortly before 10:00 p.m., Partida spoke with defendant and offered to buy him beer. Partida went to a liquor store down the street, purchased a three-pack of beer, and sat in his garage drawing while he waited for defendant.

Defendant arrived at Partida's house around 11:30 p.m. He stayed for 30 minutes then left. Around 1:00 a.m., defendant returned. He sat down and talked to Partida while Partida continued drawing. About an hour later, defendant said he was going to his house to get something to drink. When defendant returned a few minutes later, he walked up to Partida and asked, "where are [my] house keys?" Thinking defendant was joking, Partida said, "In your pocket." Defendant responded that he was not playing and asked again for his house keys. Partida told defendant that he had not seen defendant's keys, did not know what they looked like, and had no idea what defendant was talking about. Agitated and angry, defendant said, "You better make sure that my dogs or my house, my mom and my car, nothing happens to it, 'cause I have you and your friends on a list."

After defendant left, Partida started to close the garage door. Defendant walked back into the garage holding a gun. Defendant repeated that he knew Partida had defendant's keys. When Partida said he did not have the keys, defendant waved the gun around. Partida stood up. Defendant pointed the gun at Partida and told him to take a seat; Partida complied. Defendant continued to talk about his keys. Defendant accused Partida of "set[ting] [defendant] up" and pointed the gun at Partida's face. Partida told

defendant, "I have no idea what you're talking about." Defendant struck Partida on the right side of his face with the gun. Partida asked defendant, "Why are you trying to do this? Like, what's going on?" Partida offered to help look for defendant's keys. Defendant "changed his mind or something" and left.

The next morning, Partida had a bruise on his face and had difficulty opening his right eye. There was an injury above his right eyebrow. He called the police.

Deputies James Updike and Bridgette Recksiek of the Riverside County Sheriff's Department responded to the call. Partida's right eye was swollen and purple. He had an abrasion on the right side of his face. After speaking with Partida, the deputies went over to defendant's house. Deputy Recksiek knocked on the door; defendant answered. The deputies asked defendant if he would come outside and talk to them about what occurred the previous night; defendant agreed. Defendant said he "had an issue with [Partida]" and smacked Partida in the head with his fist. When asked if he had any weapons with him, defendant stated that he was carrying his pocketknife.

Deputy Updike asked defendant if he could go into the house to look for the pocketknife. Defendant gave consent. Deputy Updike entered the home; Deputy Recksiek remained outside talking to defendant. Defendant's mother directed Deputy Updike to defendant's bedroom. As soon as the deputy went into the bedroom, he saw a loaded 12-gauge shotgun on top of the chair by the far wall. There was a wooden bookshelf next to the bedroom door. A folding knife and a loaded .25-caliber semi-automatic handgun were on the shelf. The handgun had a cartridge in the chamber.

When Deputy Updike racked the shotgun, defendant, who was still outside, dropped his head to his chest. Defendant told Deputy Recksiek that the shotgun was his, and that he also had a .25-caliber handgun. During the course of their conversation, defendant admitted that he was a convicted felon.

The parties stipulated that on March 29, 2005, defendant was convicted of the felony offense of driving under the influence of alcohol and causing injury to another person.

DISCUSSION

A. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS

Defendant contends that the trial court erred in denying his motion to suppress the weapons and ammunition Deputy Updike recovered from his home. Defendant claims that the search was the product of an unlawful detention.

1. *PROCEDURAL AND FACTUAL BACKGROUND*

Before trial, defendant filed a written motion to suppress the weapons and ammunition seized from his home, and all statements defendant made to officers during the search. No grounds were given for the motion; defense counsel merely argued that because there was no search warrant, the prosecution had the burden of justifying the search. In its written opposition, the prosecution argued that defendant's initial encounter with law enforcement was consensual; defendant was not detained. During the encounter, defendant voluntarily gave consent. Once defendant consented to the deputies entering his residence, they could seize any items in plain view.

At the hearing on the motion, the parties stipulated that the search was conducted without a warrant. Deputy Updike testified that on April 13, 2013, around 1:00 p.m., he spoke with Partida regarding an assault. Partida told the deputy that defendant was the person who assaulted him. Deputies Updike and Recksiek then contacted defendant on the front porch of his residence. The porch was not enclosed. Defendant was standing by the doorway. The officers were next to him. Defendant agreed to speak with the deputies. Asked if he possessed any weapons, defense said that he did. Deputy Updike then asked defendant if the deputy could go inside and look for the weapons. Defendant responded, "'Sure, go ahead.'"

Deputy Updike entered the residence. Defendant's mother was inside. The deputy asked her for the location of defendant's bedroom. She directed him to the room. There was a pocketknife sitting in plain sight. A semi-automatic handgun was next to it. There was a 12-gauge shotgun on the opposite wall. Deputy Updike inspected the weapons. The handgun had one round in the chamber and seven rounds in the magazine. There were five or seven rounds in the handgun.

Defendant testified that when the deputies came to his house, he asked Deputy Recksiek if he could sit down. They told him that defendant could. He sat down on a chair on the porch. Deputy Updike then asked, "'Do you mind if I search your residence.'" Defendant said, "'Yeah,'" meaning he was objecting to the search. Deputy Updike walked into the house anyway. Defendant felt intimidated by the deputies, who were blocking him from either entering the home or leaving the yard.

After the close of evidence, the prosecutor argued that defendant exited his house voluntarily, sat down at his own request, and gave the deputies permission to search his home. The search was consensual, and the items seized were in plain view. Defense counsel argued that by saying, "'Yeah,'" defendant was in fact registering his objection to the search. Moreover, at the time, the deputies were surrounding him. Thus, a reasonable person would not feel free to leave. The prosecutor responded that at no time did defendant say, "'I mind'" or "'I object.'" His answer, from both Deputy Updike's testimony and defendant's own, was that he agreed to the search.

The court noted that, according to Deputy Updike, he asked, "'Is it all right if I search the house?'" Defendant agreed. Defendant, by contrast, testified that he was asked, "'Do you mind if I search?'" And, by responding, "'Yeah," he meant "no." The court noted that the deputy's version was more credible given the fact that when the deputy started the search, defendant said nothing. If the deputies had misunderstood defendant, he would have tried to stop them. His failure to do so showed that there was consent. Moreover, once the deputies were lawfully in the house, everything was found in plain view. Accordingly, the court denied defendant's motion to suppress.

2. *STANDARD OF REVIEW*

"The Fourth Amendment provides '[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . .' (U.S. Const., 4th Amend.) This guarantee has been incorporated into the Fourteenth Amendment to the federal Constitution and is applicable to the states. [Citation.] A similar guarantee against unreasonable government searches is set forth in

the state Constitution (Cal. Const., art. I, § 13) but, since voter approval of Proposition 8 in June 1982, state and federal claims relating to exclusion of evidence on grounds of unreasonable search and seizure are measured by the same standard. [Citations.] 'Our state Constitution thus forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the federal Constitution as interpreted by the United States Supreme Court.' [Citation.]" (*People v. Camacho* (2000) 23 Cal.4th 824, 829-830, fn. omitted.)

"In reviewing the trial court's ruling on the suppression motion, we uphold any factual finding, express or implied, that is supported by substantial evidence, but we independently assess, as a matter of law, whether the challenged search or seizure conforms to constitutional standards of reasonableness." (*People v. Hughes* (2002) 27 Cal.4th 287, 327.)

3. *DEFENDANT WAS NOT DETAINED*

A contact between an individual and a member of law enforcement is not always a detention or arrest, which will implicate Fourth Amendment protections. "Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. [Citations.] Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. [Citation.] . . . If there is no detention—no seizure within the meaning of

the Fourth Amendment—then no constitutional rights have been infringed." (*Florida v. Royer* (1983) 460 U.S. 491, 497-498.)

In order to determine whether an encounter constitutes a seizure, "a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." (*Florida v. Bostick* (1991) 501 U.S. 429, 439.)

A seizure occurs only "when the officer, '"by means of physical force or show of authority,"' terminates or restrains [a person's] freedom of movement, [citations], '*through means intentionally applied,*' [citation]." (*Brendlin v. California* (2007) 551 U.S. 249, 254.) A detention will not be found unless, in light of the circumstances, '"'"a reasonable person would have believed that he . . . was not free to leave" [citation].'" (*People v. Zamudio* (2008) 43 Cal.4th 327, 341.) "When a person 'has no desire to leave' for reasons unrelated to the police presence, the 'coercive effect of the encounter' can be measured . . . by asking whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.' [Citation.]" (*Brendlin v. California*, *supra*, 551 U.S. at p. 255.) The test is an objective one, which looks to the officer's intent as objectively manifested to the person the officer has confronted. (*Zamudio*, at p. 341.)

"Th[e] test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

The fact that the encounter occurs at an individual's home does not transform it into a detention. "Consensual encounters may . . . take place at the doorway of a home." (*People v. Rivera* (2007) 41 Cal.4th 304, 309.) Unless the police demand that the occupant open the door and come outside, Fourth Amendment protections are not implicated. (*People v. Colt* (2004) 118 Cal.App.4th 1404, 1411.)

"'Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law.' [Citation.]" (*People v. Rivera, supra,* 41 Cal.4th at p. 309.) The question to be answered in such cases is whether the encounter was consensual under the totality of the circumstances. (*People v. Jenkins* (2004) 119 Cal.App.4th 368, 371-375.)

In this case, Deputy Updike testified that he and Deputy Recksiek spoke to defendant while defendant was standing on his front porch by the doorway. The porch was not enclosed. They were standing to his side, leaving his path unobstructed. They never informed defendant that he was not free to leave or go back inside. Defendant agreed to speak with the deputies. He indicated that he possessed weapons. When Deputy Updike asked defendant if he could go inside to search for weapons, defendant responded, "'Sure, go ahead.'" "The conversation was nonaccusatory, routine, and brief, and would not have caused a reasonable person to believe that his or her liberty was being restrained." (*People v. Hughes*, *supra*, 27 Cal.4th at p. 329.)

Moreover, the trial court noted that as the deputy "starts to walk into the house to search, apparently [defendant] says nothing, does nothing. [¶] . . . [¶] Apparently what happened is after the defendant said, 'Yeah,' the peace officer walked into the house. No objection made, no comments made, no statements made. And obviously the defendant is seated right there, sees it happen, knows what's going to happen, and makes no effort, either verbally or in any other way, to prevent the search from occurring. [¶] So it clearly indicates to the Court that the understanding was that there was consent by the peace officer to make the search."

Thereafter, once defendant gave his permission it was constitutionally permissible for the deputies to go into the house, take possession of the weapons in plain view, and speak to defendant about them. "One of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant

to consent." (*Schneckloth v. Bustamante* (1973) 412 U.S. 218, 219; accord *People v. Valencia* (2011) 201 Cal.App.4th 922, 928.)

Notwithstanding, defendant argues that he was detained and his consent was involuntary. In support, defendant cites to his own testimony at the suppression hearing. Defendant, however, ignores testimony given by Deputy Updike. On appeal, however, we must defer to the trial court's assessment of credibility. Here, the trial court believed Deputy Updike. Defendant also points to Deputy Updike's testimony that *if* defendant had tried to leave, *then* the deputy would have detained him. However, the fact that defendant may have been detained at some point in the future does not mean he was detained upon contact. Moreover, the deputy's subjective belief is irrelevant to the inquiry. (*In re Manuel G.*, *supra*, 16 Cal.4th at p. 821.)

In sum, because defendant was not detained and he gave the deputies permission to search his home, the trial court properly denied his motion to suppress.

B. THE MINUTE ORDER FROM THE SENTENCING PROCEEDINGS SHOULD BE CORRECTED

The minute order from the sentencing proceedings indicates that the court imposed a $500 sex offender fine under section 290.3. Defendant asks us to vacate this entry because the trial court did not impose such a fine during sentencing, and defendant was not convicted of a sex offense; the People agree. We agree with the parties that the entry should be stricken.

DISPOSITION

The trial court is directed to strike the $500 sex offender fine. The trial court is also directed to amend the abstract of judgment so as to reflect the modification and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. (§§ 1213, 1216.) In all other respects, the judgment is affirmed.

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MILLER
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.